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MALPAC CAPITAL SDN BHD v. YONG TOI MEE & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
MOHD ZAWAWI SALLEH JCA
VERNON ONG LAM KIAT JCA
B ABDUL RAHMAN SEBLI JCA
[CIVIL APPEALS NO: A-02(IM)-417-03-2015
& A-02(IM)-418-03-2015]
15 JULY 2016

C ***CIVIL PROCEDURE:*** *Res judicata – Final judgment obtained – Apex court affirmed findings of trial judge – Revisiting issues after perfection of order – Whether party can re-litigate or raise issues conclusively decided – Whether decision of apex court rendered matter final*

D The appellant had been offered a plantation to off-set a secured debt. The appellant had nominated the third respondent to receive the plantation. The appellant then entered into three agreements (the composite agreement) for the onward sale of the plantation. One of those agreements was an agreement between the appellant and the first and second respondents for the sale of two ordinary shares held by the appellant in the third respondent. The original E share capital of the third respondent consisting of two shares was increased by an additional 99,998 ordinary shares. The first and second respondents averred that they were ready and willing to complete the purchase but the appellant refused to accept the balance of the purchase price. In 2007, the first and second respondents filed a claim at the High Court, seeking F (i) specific performance of the three agreements; and (ii) for the transfer of the entire issued and paid-up shares of the third respondent. The High Court, *inter alia*, allowed the first and second respondents' claim and dismissed the appellant's counter claim. The Court of Appeal subsequently, amongst others, allowed the appellant's appeal. The Federal Court then reversed the G decision of the Court of Appeal and reinstated the judgment of the High Court. Since the appellant did not receive the balance of purchase price tendered by the first and second respondents, the first and second respondents sought for further directions ('encl. 62') so that the judgment of the High Court could be carried into execution. In response, the appellant filed a H cross-application ('encl. 69'). The Judicial Commissioner ('JC') allowed encl. 62 but dismissed encl. 69. Hence, the present appeal. The appellant, *inter alia*, contended that the JC had brushed aside the appellant's contentions on the nature and effect of a decree for specific performance simply because it had been unsuccessful in the earlier appeal proceedings. It was further argued by the appellant that the contractual rights of the parties did not merge I in the decree for specific performance. On the other hand, the first and second respondents contended that the judgment had been perfected.

Therefore, the first and second respondents argued that the appellant should not be allowed to abuse the process of the court by re-visiting and re-opening the issues which had been conclusively decided by the apex court.

Held (dismissing appeal)
Per Mohd Zawawi Salleh JCA delivering the judgment of the court:

(1) The decision of the Federal Court had finally disposed of the rights of the parties. Therefore, the controversy in respect of the rights and obligations between the parties had ceased to have an independent existence because they 'merged' in the final judgment pronounced by the Federal Court. This merger is treated as equating to *res judicata* in the strict sense. (para 15)

(2) The issue of the subsequent additional 99,998 shares and the non-payment of profits to the appellant as owner of the plantation before the actual completion of the agreement had already been adjudicated on the merits. Therefore, they ceased to have independent existence and merged in the final judgment of the Federal Court. The appellant should not be allowed to re-open the matter or to have the court re-consider its conclusion. (para 17)

(3) The present litigation is unnecessary and is brought about by the appellant refusing to accept the judgment of the Federal Court. This was a repetition of the same ground that the appellant advanced in the review application before the Federal Court. The doctrine of *res judicata* should be invoked. (para 18)

***Bahasa Malaysia** Headnotes*

Perayu ditawarkan sebidang ladang untuk tolak selesai hutang bercagar. Perayu mencalonkan responden ketiga untuk menerima ladang tersebut. Perayu kemudian memeterai tiga perjanjian (perjanjian komposit) untuk penjualan terus ladang tersebut. Salah satu perjanjian tersebut adalah perjanjian antara perayu dan responden pertama dan kedua bagi penjualan dua saham biasa yang dipegang oleh perayu dalam responden ketiga. Modal saham berbayar asal responden ketiga yang terdiri daripada dua saham telah meningkat dengan tambahan 99.998 saham biasa. Responden pertama dan kedua menegaskan bahawa mereka bersedia untuk melengkapkan pembelian tersebut tetapi perayu enggan menerima baki harga belian tersebut. Pada tahun 2007, responden pertama dan kedua memfailkan tuntutan di Mahkamah Tinggi untuk (i) pelaksanaan spesifik tiga perjanjian tersebut; dan (ii) bagi pemindahan keseluruhan saham terbitan dan berbayar penuh responden ketiga. Mahkamah Tinggi, antara lain, membenarkan tuntutan responden pertama dan kedua dan menolak tuntutan balas perayu. Mahkamah Rayuan kemudiannya, antara lain, membenarkan rayuan perayu. Mahkamah Persekutuan seterusnya membatalkan keputusan Mahkamah Rayuan dan mengekalkan penghakiman Mahkamah Tinggi. Oleh kerana

perayu tidak menerima baki harga belian yang dikemukakan oleh responden pertama dan kedua, responden pertama dan kedua menuntut arahan lanjut ('lampiran 62') supaya penghakiman Mahkamah Tinggi boleh dilaksanakan. Sebagai balasan, perayu memfailkan permohonan balas ('lampiran 69'). Pesuruhjaya Kehakiman ('PK') membenarkan lampiran 62 tetapi menolak lampiran 69. Oleh itu, rayuan ini. Perayu, antara lain, menegaskan bahawa PK menolak hujahan perayu mengenai sifat dan kesan pelaksanaan spesifik hanya kerana ia gagal dalam prosiding rayuan sebelum ini. Perayu selanjutnya menghujahkan bahawa hak berkontrak pihak-pihak tidak bergabung dalam perintah pelaksanaan spesifik. Sebaliknya, responden pertama dan kedua menegaskan bahawa penghakiman tersebut telah disempurnakan. Oleh itu, responden pertama dan kedua menghujahkan bahawa perayu tidak boleh dibenarkan menyalahgunakan proses mahkamah dengan mempertimbangkan dan membuka semula isu-isu yang telah diputuskan oleh mahkamah tertinggi secara muktamad.

Diputuskan (menolak rayuan)
Oleh Mohd Zawawi Salleh HMR menyampaikan penghakiman mahkamah:

(1) Keputusan Mahkamah Persekutuan telah memutuskan hak pihak-pihak secara mutlak. Oleh itu, kontroversi berkenaan dengan hak dan tanggungjawab antara pihak-pihak tidak lagi wujud secara bebas kerana mereka 'bergabung' dalam penghakiman akhir yang diberikan oleh Mahkamah Persekutuan. Penggabungan ini dianggap sebagai bersamaan dengan *res judicata* dalam erti kata yang ketat.

(2) Isu berkaitan tambahan 99.998 saham dan kegagalan membayar keuntungan kepada perayu sebagai pemilik ladang sebelum penyelesaian sebenar perjanjian telah pun diputuskan berdasarkan merit. Oleh itu, mereka tidak lagi wujud secara bebas dan digabungkan dalam penghakiman muktamad Mahkamah Persekutuan. Perayu tidak harus dibenarkan membuka semula perkara tersebut atau meminta mahkamah mempertimbangkan semula kesimpulannya.

(3) Litigasi ini tidak perlu dan dibawa oleh perayu yang enggan menerima penghakiman Mahkamah Persekutuan. Ini adalah ulangan alasan sama yang dihujahkan perayu dalam permohonan semakan di Mahkamah Persekutuan. Doktrin *res judicata* harus diguna pakai.

Case(s) referred to:
Abdul Shaik Sahib v. Abdul Rahman Sahib AIR 1923 Mad 284 ***(refd)***
Ramankutty Guptan v. Avara AIR 1994 SC 1699 ***(refd)***
Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No 2) [1970] 1 LNS 150 FC ***(refd)***
Tan Yeow Khoon & Anor v. Tan Yeow Tat & Anor (No 2) [1997] 2 SLR 209 ***(refd)***
Thoday v. Thoday [1964] P 181 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 132C

Other source(s) referred to:
Halsbury Laws of England, 4th edn, vol 37, para 1230
Spencer Bower and Handley, *Res Judicata*, 4th edn, para 1.05

For the appellant - Cecil Abraham, Logan Sabapathy, Alithea Wong & Chuar Pei Yean; M/s Logan Sabapathy & Co
For the respondents - Cyrus Das, A Iruthaya Raj & Abdul Razak; M/s Raj Selva & Co

[Editor's note: For the High Court judgment, please see Yong Toi Mee & Anor v. Malpac Capital Sdn Bhd & Ors [2015] 1 LNS 416 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Mohd Zawawi Salleh JCA:

Introduction

[1] There are two interrelated appeals before us: Civil Appeal No. A-02(IM)-417-03-2015 and Civil Appeal No. A-02(IM)-418-03-2015. Both appeals arose out of the High Court's decision given on 17 February 2015 (Che Mohd Ruzima Ghazali JC (as he then was presiding) which had allowed the first and second respondents' application in encl. 62 and dismissed the appellant's application in encl. 69.

[2] Enclosure 62 is the first and second respondents' application for directions pursuant to the judgment of the High Court given on 5 May 2011 (Zainal Adzam Abd Ghani J presiding).

[3] Enclosure 69 is the appellant's cross-application where the appellant had applied for several issues of law to be considered and also sought various consequential orders, including a stay of the first and second respondents' primary application.

Factual Background And The Antecedent Proceedings

[4] In order to give some perspective to these appeals, it is necessary to briefly outline the genesis of the dispute between the parties which has caused them to file their respective applications. These can be summarised as follows:

(a) the appellant (first defendant in the High Court) is a wholly owned subsidiary of one Malpac Holdings Berhad, a listed company;

(b) in 2002, the appellant had been offered a plantation by special administrators of its debtor to off-set a significant secured debt owned by that debtor to the appellant;

(c) the appellant had nominated its wholly subsidiary, namely the third respondent (third defendant in the High Court) to receive that plantation;

(d) on 5 April 2002, the appellant together with one entity (second defendant in the High Court) had entered into three agreements (the composite agreement) for the onward sale of plantation and the prospective sale of a mill. One of those agreements was an agreement between the appellant and the first and second respondents for the sale of two ordinary shares then held by the appellant in the third respondent;

(e) on or about January 2005, the original share capital of the third respondent consisting of two shares had been increased by an additional 99,998 ordinary shares;

(f) the first and second respondents averred that they were ready and willing to complete the purchase but the appellant refused to accept the balance of the purchase price;

(g) in reply, the appellant stated that the increase in capital was taken with express notice to the first and second respondents and they were aware that the appellant was not prepared to consider the sale of those subsequent additional 99,998 shares without a further agreement and appropriate corporate approvals;

(h) in 2007, the first and second respondents filed a claim *vide* Ipoh High Court CS No. 22-109-2007, seeking the following primary reliefs:

(i) specific performance of the three agreements dated 5 April 2002 based of the values fixed in 2002; and

(ii) a further order for the transfer of the entire issued and paid-up shares of the third respondent;

(i) after full trial, the High Court allowed the first and second respondents' claim and also dismissed the counterclaim by the appellant and the third respondent;

(j) dissatisfied the judgment of the High Court, the appellant and the third respondent appealed to the Court of Appeal which allowed the appeal on 17 January 2012 and set aside the judgment of the High Court. The Court of Appeal further directed that the appellant's counterclaim be determined by the High Court;

(k) on 4 September 2013, the Federal Court reversed the decision of the Court of Appeal and reinstated the judgment of the High Court;

(l) on 4 March 2014, the Federal Court dismissed the appellant's application for review;

(m) on 19 June 2014, as stated earlier, the first and second respondents applied to the High Court for further orders and directions (encl. 62). In response, the appellant filed a cross-application (encl. 69);

(n) both applications were heard by the learned JC and on 17 February 2015, he allowed encl. 62 and dismissed encl. 69; and

(o) the appellant's appeal in respect of encl. 69 is the subject of the Appeal No. A-02(IM)-418-03-2015 and the appellant's appeal in respect of encl. 62 is the subject of the Appeal No. A-02(IM)-417-03-2015.

Findings Of The High Court

[5] The core of the learned JC's reasoning is to be found in the following passages in his judgment:

> Encl. 69
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> [40] All issues raised by the 1st defendant were taken up or supposed to be taken up before the Federal Court in the substantive appeal or on the review application. It needs to emphasise that the decision of the High Court had been affirmed by the Federal Court. It cannot be re-visited under any guise in any subsequent proceedings. The decision of the apex court is final and the losing parties should not try to manoeuvre around it, however unhappy they are. Due respect should be given to the High Court's decision which was affirmed by the Federal Court. The so-called threshold questions and related issues raised by the 1st defendant on which the Court has to address are neither new nor noble.
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> ...
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> Encl. 62
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> [44] The 1st defendant exhausted all avenues to appeal. It refused to accept the payment tendered for the balance of the purchase price after the Federal Court dismissed the review application. The 1st defendant chose to act in defiance of the decree of specific performance by disobeying the Courts' judgment. In that situation, the plaintiffs have all the right to apply for further direction from the Court to complete the purchase. The plaintiffs had been waiting for so long to reap the fruits of their fruitful litigation. The Court can no longer deny or delay such right.

The Appeal

[6] The focus of criticism which learned senior counsel for the appellant directs to the judgment of the High Court is four-fold. First, he complains that the learned JC erred in emphasising on unsuccessful appeal proceedings. Secondly, he complains that the learned JC failed to properly address the core issues of whether or not the first and second respondents were entitled to call for a transfer of the subsequent additional 99,998 shares. Thirdly, he complains that the learned JC failed to consider the undisputed fact that there was no approval under s. 132C of the Companies Act 1965 for the divestment of the subsequent additional 99,998 shares. Fourthly, he complains that the learned JC erred in permitting the first and second respondents to obtain ownership of the plantation assets without first paying the outstanding profits.

[7] In sum, says learned senior counsel, the learned JC's decision was simply wrong and his decision ought to be reversed.

[8] In reply, learned senior counsel for the first and second respondents submitted that after the dismissal of the appellant's application for review by the Federal Court on 7 March 2014, the first and second respondents had tendered the balance of purchase price but it was not accepted by the appellant. In view of the position taken by the appellant, there was no choice but to seek further directions so that the judgment of the High Court given on 5 May 2011 can be carried into execution.

[9] The important plank of learned senior counsel's submission is that the learned JC had decided the appellant's claim and counterclaim by the first and second respondents on merits. The judgment had been perfected and the appellant appealed against the judgment and was unsuccessful and that should be the end of the matter. The appellant should not be allowed to abuse the process of the court by re-visiting and re-opening the issues which had been conclusively decided by the highest court in the land. The doctrine of *res judicata* should be invoked.

Our Findings

[10] We do not propose to discuss all of the issues raised by learned senior counsel for the appellant but we will deal with the important grounds of appeal advanced on behalf of the appellant.

[11] Learned senior counsel for the appellant submitted that the learned JC had disregarded in entirety the settled law on the nature and effect of a decree for specific performance.

[12] According to learned senior counsel, the learned JC had brushed aside the appellant's contentions on the nature and effect of a decree for specific performance simply because it had been unsuccessful in the earlier appeal proceedings. It was contended by learned senior counsel that a contractual rights of the parties do not merge in the decree for specific performance. It had been strongly argued before us that an order for specific performance does not get rid of the contract. The contract is not merged in the order, but it is treated, and always has been treated by the court of equity, as still subsisting. We have been referred to a great many cases of various courts in support of the submission but we shall contend ourselves with referring to the cases hereinafter discussed.

[13] In *Ramankutty Guptan v. Avara* AIR 1994 SC 1699, the Supreme Court of India has in no uncertain term held that after passing the degree for specific performance, the court does not cease to have jurisdiction in the suit but retains control over the decree.

[14] In the same vein, in *Abdul Shaik Sahib v. Abdul Rahman Sahib* AIR 1923 Mad 284, the Madras High Court held that the degree for specific performance was in its nature a preliminary decree; the original court retains the full power to make any just or necessary order therein, including in appropriate cases, the extension of time.

[15] We have no difficulty in accepting the proposition above. However, on the factual matrix of the case before us, we agree with the JC's conclusion that the decision of the Federal Court had finally disposed of the rights of the parties. Therefore, the controversy in respect of the rights and obligations between the parties had ceased to have an independent existence because they 'merged' in that final judgment pronounced by the Federal Court. Further, this merger has long been treated as equating to '*res judicata*' in the strict sense.

[16] We disagree with the submission of learned senior counsel for the appellant that after the conclusion of the appeal proceedings, there are two broad subsequent issues to be resolved by the court, namely:

(a) the issue of the subsequent additional 99,998 shares; and

(b) the non-payment of profits to the appellant as owner of the plantation assets before actual completion of the agreement.

[17] We are of the view that the above issues had already been adjudicated on the merits. Therefore, they ceased to have independent existence and merged in the final judgment of the Federal Court. The appellant should not be allowed to re-open the matter or to have the court reconsider its conclusion. This is because of the public interest in the finality of litigation. Without finality, the process and cost of litigation would be never ending, as parties would forever be returning to the court to reargue the case and for tactical advantage.

[18] We agree with the written submissions of learned counsel for the first and second respondents that the present round of litigation is unnecessary and is brought about by the appellant refusing to accept the judgment of the Federal Court. This is a repetition of the same ground that the appellant advanced in the review application before the Federal Court. The doctrine of *res judicata* should be invoked.

[19] Now, *res judicata* is a fundamental legal doctrine that prevents a party from relitigating any claim or defence already litigated. It is meant to ensure the finality of judgments and to conserve judicial resources whilst protecting litigants from multiple litigation involving the same claims or issues.

[20] In the 4th edn of Spencer Bower and Handley on *Res Judicata* (2009), it is stated at para 1.05 that *res judicata* can either give rise to a cause of action estoppel or to an issue estoppel. The relationship between cause of action estoppel and issue estoppel was described by Diplock LJ in *Thoday v. Thoday* [1964] P 181, pp. 197-198:

> The particular type of estoppel relied upon by the husband is estoppel *per rem judicatam*. This is a generic term which in modern law includes two species. The first species, which I will call 'cause of action estoppel', is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of

A competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, ie, judgment was given upon it, it is said to be merged in the judgment, or, for those who prefer Latin, *transit in rem judicatam*. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped *per rem judicatam*. This is simply an application of the rule of public policy expressed in the B Latin maxim '*Nemo debet bis vexari pro una et eadem causa*'. In this application of the maxim '*causa*' bears its literal Latin meaning.

[21] Learned senior counsel for the appellant submitted that the extracted judgment of the High Court given on 5 May 2011 only decreed specific performance of the three agreements dated 5 April 2002 without further C orders to address the subsequent additional 99,998 shares. With respect, we disagree. In allowing the first and second respondents' claim and dismissing the counterclaim by the appellant, the first and second defendants were given liberty to apply to the court for further order and/or directions.

D **[22]** The principles as to the scope of "liberty to apply" provisions were stated by Lord Mackay of Clashfern in *Halsbury Laws of England*, 4th edn, re-issue, vol. 37, 2001, para. 1230 as follows:

The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent E liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not F thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down. It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances. Should G the declaration be omitted, application may be made to have the judgment rectified by inserting it. It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur.

H **[23]** Even in the case of final orders or judgments that had been perfected, the case of *Sungei Biak Tin Mines Ltd v. Saw Choo Theng & Anor (No 2)* [1970] 1 LNS 150; [1970] 2 MLJ 226 held that liberty to apply was to be implied. In *Tan Yeow Khoon & Anor v. Tan Yeow Tat & Anor (No 2)* [1997] 2 SLR 209, the court held that even if a subsequent order or direction were to be regarded I as a variation, it would still fall within the ambit of the "liberty to apply" provision if the order or direction were intended only to succour the original order.

[24] In our view, what amounts to a variation is a question of fact and circumstances obtaining in each case. In the case before us, we are of the view that the consideration of RM53 million is for the entire equity of the third respondent and not for the two shares only. Our conclusion is supported by the following facts:

(a) the third respondent's averment in the statement of claim that the consideration was for the purchase of the entire issued and paid-up capital of the third respondent. There was an implied admission by the appellant and the third respondent in their defence;

(b) the relief prayed for by the appellant is for the transfer of the entire issued and paid-up capital of the third respondent;

(c) it was an agreed fact that the purchase was in respect of the entire equity of the third respondent;

(d) the judgment of the High Court dated 5 May 2011 was also in respect of the entire equity; and

(e) the appellant appealed against the decision of the High Court to the Court of Appeal but there was no challenge that the learned High Court Judge was wrong in ordering the transfer of the entire equity of the third respondent.

[25] Therefore, the issue relating to the rights of the first and second respondents to the additional 99,998 shares had already been resolved by the court and not an attempt by the first and second respondents to revisit the same under the guise of "liberty to apply" provisions.

[26] Concerning s. 132C of the Companies Act 1965, we are of the view that the provision is not applicable to the case before us. We accept the submission of learned senior counsel for the first and second respondents that the appellant has given the required approval (see para. 14(c) of the statement of agreed facts at p. 76 of (B). The holding company too has given its approval (see p. 197 of (B)).

[27] We also observe that the issue was part of the pleading (see pp. 249 to 250 of (B), paras. 24 and 25) and therefore the issue had already been adjudicated. The same issue was also taken up in the review application before the Federal Court but it was dismissed.

Conclusion

[28] The result, therefore, in that we affirm the decision of the learned JC and dismiss the appeal with costs of RM60,000. Deposit to be refunded.